No. 11885

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Tug Rocona, her engines, tackle, apparel and furniture; Johnson Western Company, a corporation, and Case Connolly Company, a corporation,

Appellants,

vs.

Guy F. Atkinson Company, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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This reply to Appellee's Brief will be as short as possible, and will deal only with such features as appear to require comment. Appellants' theory, argument of the case and authorities were fully developed in the Opening Brief.

I.

The Findings of the District Court Are Merely Supported by a Rebuttal Prima Facie Presumption of Correctness and Will Be Upset if Clearly Erroneous.

In four pages at the commencement of appellee's argument in its brief, appellee has indexed twenty-six cases, accompanying none of them by any particularly enlightening comment. It probably would be more profitable in

terms of research were this court to refer to any standard digest under the appropriate subject heading rather than to the necessarily incomplete index of cases supplied by appellee in its first point of argument.

Appellee has cited *Heder v. U. S.,* decided by this court on May 5, 1948. The case is, as yet, unreported, and from the practical standpoint appellee apparently has a monopoly upon the decision; however, if it is of the same type as most of the other cases cited under Point I of Appellee's Brief, it merely states the general rule concerning the *prima facie* rebuttal presumption in favor of District Court findings, etc., and also similar to appellee's other cases, was probably decided upon compelling proof based upon clear and direct evidence.

We have read all of appellee's cases, save only *Heder v. U. S.,* above. *The Ernest H. Meyer,* 84 F. (2d) 496 (cert. den. 299 U. S. 600, 81 L. Ed. 442), was relied upon by us in our Opening brief (pp. 31, 32) and, though tried wholly upon depositions, adequately and clearly expounds the true rule concerning District Court findings in general and to which rule this court obviously will adhere.

Appellee, in addition to relying upon the case of *The Ernest H. Meyer,* above, likewise relies upon *Matson Navigation Co. v. Pope & Talbot* (C. C. A. 9, 1945), 149 F. (2d) 295 (cert. den. 326 U. S. 737, 90 L. Ed. 439). This court minutely weighed the whole evidence, came to a conclusion differing from that of the trial court, and *reversed* the decree below.

In most of the cases cited by appellee on this subject the appellate court has carefully weighed and considered

all of the evidence and, where the decree was affirmed, has reached an independent but concurring judgment.

The true import of appellee's apparent position would require this court virtually to refuse even to read the evidence given by appellants' witnesses. Mr. Justice Denman of this court in *The Ernest H. Meyer* case, above, has recognized that an admiralty appeal is not the same proceeding in respect to considering the evidence below, as that had upon a writ of error. The whole evidence is to be weighed and the appellate court requires that there be apparent *substantial* evidence, not merely *some* evidence, in support of the trial court's findings. (See App. Op. Br. p. 32.)

The character of the record in the case at bar differs essentially and substantially from practically all of the cases relied upon by appellee in that there is a total absence from the record of any conflicting direct evidence. The conflict in proof which inheres in this case is, on the contrary, between inferences, probabilities, speculations, guesses, etc. The Second Circuit has said (*The Albany,* 81 Fed. 966, 968-969):

> "The 'personal equation' of the witnesses is of no assistance in determining what are or are not the probabilities of the case."

The Albany, above, presented a record strikingly similar in character to that before this court, and we respectfully request that this court again review appellants' treatment thereof, commencing at the bottom of page 49 and concluding on page 51, Appellants' Opening Brief.

II.

Appellants Are Not Required to Negative Every Possible Cause of the Damage, nor to Ascertain and Prove the Precise Manner, Time and Cause of the Hole in the Bottom of Barge No. 4414.

Appellee has forthrightly accepted the proposition that proof of the injury does not raise a presumption of negligence and that the ultimate burden of proof rests upon appellee. (Br. for App. p. 25.)

We have demonstrated (App. Op. Br. pp. 29, 43, 44) that the duty of identifying the cause or the time of the injury is not upon the appellants but that on the contrary, the duty is upon the appellee to exclude (as the necessary intendments of its proof) every reasonable hypothesis of a cause for which appellants would not be legally responsible.

Appellee merely presented "two or more states of case upon which one may theorize as to the cause of the accident." (*Hughes v. Cincinnati etc. Ry. Co.,* 91 Ky. 526, 16 S. W. 275, quoted on p. 44, App. Op. Br.) We respectfully refer the court at this point to a reconsideration of pages 42-44, Appellants' Opening Brief, where *The Pride,* 135 F. (2d) 999 (C. C. A. 2nd), is quoted on the subject of ". . . how much speculation must underlie any attempt on the evidence in this record to attribute the injury to the barge to some specific cause."

Whether or not there was negligence in appellee's loading of the barge and her resulting trim, that circumstance of being high at the bow and low at the stern would still

constitute a precondition making it easier for Barge No. 4414 to come afoul of the mooring float in some unidentified manner after she had crossed the Catalina Channel and acquired a considerable quantity of free water in her hold. [Ap. p. 114.]

Appellee has attempted little, if any, assistance to this court in analyzing the effect of the evidence. Possibly a detailed analysis of the evidence to establish by compelling inference which would exclude all reasonably possible causes for which appellants would not be liable, "would not write." An attempt is made in the Brief for Appellee to reconstruct speeds and distances (Br. for App. p. 15) and thus to come up with the conclusion of sufficient momentum on the barge to overrun the float and punch a hole in her bottom. We respectfully submit that appellee's effort is unconvincing and a most unreliable and untrustworthy argument.

In the first section of its argument (Br. for App. p. 10) appellee confidently refers to the finding [Ap. p. 25] that the testimony of the witnesses for appellants was not convincing and could not be accepted—the finding, of course, being that drafted by the appellee and not by the court. Thereafter, throughout its brief appellee time and again supports its argument by repeated references to and quotations from testimony given by appellants' witnesses. We would suggest that appellee should make up its mind one way or the other, either to stay with the apparent original thesis that those witnesses were wholly incredible,

or that appellee's later position is the proper one, *i. e.,* that such witnesses were believable for at least some purposes.

The actual reaction in the trial judge's mind was that the physical facts "speak louder than the words of the witnesses." [Ap. p. 213.] We submit, of course, that he was in error in thus permitting the proven physical facts such as they were to outweigh the credible, direct and unimpeached oral testimony of the Captain and his crew. The trial judge did not say that he did not *believe* appellants' witnesses—those words of disbelief and non-acceptance were coined by appellee's counsel for the findings.

We trust that the court will not be misled by the statement found in the middle of page 16, Brief for Appellee, to the effect that "the barge had way and was moving into the float, pushing it along ahead of the barge." That statement is gratuitous from appellee's counsel and finds no support whatever in the evidence.

Appellee refers (Br. for App. p. 20) to the opinion of the surveyor that the barge overrode the mooring float and was punctured by the "U" bolt. [Scheibe, Ap. p. 107.] He did so testify, but that falls far short of opinion evidence that the *tug* was in any manner responsible for such overriding. As we previously mentioned in our Opening Brief (pp. 27, 28), Mr. Scheibe did no more than negative the ordinary and usual conditions of current, tide and surge as the cause.

III.

Res Ipsa Loquitur Is Not Applicable Because the Supposedly Speaking "Thing" Was Not Proved to Be a Link in the Causal Chain Connecting an Act or Omission of Appellants to the damage to the Barge.

The speaking "thing" in this case, were *res ipsa loquitur* applicable, would be the maneuvering and moving of the barge by the ROCONA to the mooring block. The enduring and unbridged gap is the identification of the time of injury as occurring directly and proximately from some act committed or omitted *before* the tug released control of the barge.

Before reaching the final step in the application of *res ipsa loquitur, i. e.,* inference of negligence, it is first necessary to presume or infer that the ROCONA was in charge of the barge when damaged and *at the same time* further presume or infer that the injury occurred by towing over or permitting the barge to drift over, the float. It piles too many unreliable and unsupported presumptions upon presumptions and makes impossible any just application of the doctrine.

We refer this court to our previous discussions along the same lines on pages 49-50 and 54-55, Appellants' Opening Brief.

In Appellants' Opening Brief (p. 59) it was mentioned that two of the cases relied upon by appellee (*Johnson v. U. S.,* ..... U. S. ....., 92 L. Ed. (Adv.) 360, and *Jesionowski v. Boston & Maine R. Co.,* 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401) were not of assistance in this matter, for the reason that the facts are entirely at variance. The primary difficulty in the case at bar is the factual situation as justifying or not justifying the application of the rule.

Appellee's case of *Sweeney v. Erving,* 228 U. S. 233, 57 L. Ed. 815, is not applicable as an authority, for the reason that the court did not consider the case as involving *res ipsa loquitur:*

> "In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof."

Appellee's cited case of *Liggett & Myers Tobacco Co. v. De Lape* (C. C. A. 9th, 1940), 109 F. (2d) 598, 601, was a case of "foreign substance." All such cases have been accorded somewhat different treatment in regard to *res ipsa loquitur* and are decided on principles inapplicable to the instant case. The opinion, however, does have two very pertinent sentences (p. 601):

> "The presence of the thing leaves open no reasonable hypothesis that the objectionable presence occurred notwithstanding uninterrupted care. The doctrine is not applicable where the *causa injuria* may have originated from sources foreign to the manufacture of the thing sold."

Paraphrasing, we might say that the doctrine is not applicable in the case at bar where the *causa injuria* may have been attributable to something other than the act or omission of the tug ROCONA.

Appellee's wholly erroneous view of the rules applicable in these circumstances is disclosed in the final paragraph (p. 26) of Brief for Appellee, wherein it is argued that appellants should have proved some plausible explanation of the damage inconsistent with supposed negligence on the part of the tug. That is not the law but it *is* apparently what the trial court would require.

Conclusion.

Appellee's reply to the appellants fails wholly to meet the appellants' demonstration of clear and substantial error in the trial court and takes no notice whatever of the many compelling authorities clearly in point and which were analyzed and applied at length in Appellants' Opening Brief. Appellee's Brief exudes supreme confidence and a feeling of security bordering closely upon disdain for appellants' presumptuous *(sic)* attack upon the trial court's interlocutory decree, by appealing therefrom.

We agree with appellee's admission (Br. for App. p. 23) that "it is impossible to do more than speculate" in this case as to how the damage to Barge No. 4414 was caused. Appellants respectfully submit that an Interlocutory Decree founded upon speculation and guessing, unbuttressed by substantial evidence, will not be permitted by this court to stand.

The Interlocutory Decree and Order of Reference should be reversed and the libel should be dismissed.

Respectfully submitted,

Hill, Morgan & Farrer,

By William S. Scully,

Proctors for Appellants.